Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Cross-Petitioner,

v.

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, a/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a United States Coast Guard Order to Alter a bridge, that is issued under the Truman-Hobbs Act, 33 U.S.C. §§ 511-524, admissible under Federal Rule of Evidence 803(8)(C) in a negligence action for damages arising from a vessel/bridge allision for the purpose of proving a railroad or governmental highway authority was negligent in the construction, design or maintenance of the bridge?

PARTIES TO THE PROCEEDING AND DISCLOSURE STATEMENT

Cross-Petitioner

Cross-Petitioner is the Union Pacific Railroad Company, which is not a publicly traded company. The Union Pacific Corporation is a publicly traded company owning more than ten percent (10%) of the stock of Union Pacific Railroad Company. The Union Pacific Railroad Company was the Plaintiff in the District Court and the Appellant before the Eighth Circuit Court of Appeals.

Cross-Respondent

Cross-Respondent is Kirby Inland Marine, Inc. of Mississippi, f/k/a Brent Transportation Company, *in personam*. Kirby Inland Marine, Inc. of Mississippi, and the M/V Miss Dixie were the Defendants in the District Court and the Appellees before the Eighth Circuit Court of Appeals.

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner petitions the Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, which reversed in part and affirmed in part the decision of the District Court, is reported at 296 F.3d 671 (8th Cir. 2002) and is in Appendix A to Kirby's petition for writ of certiorari. The decision of the District Court for the Southern District of Iowa, Davenport Division, is reported at 2001 WL 1689710 and is in Appendix B to Kirby's petition. The decision of the Court of Appeals denying Kirby's petition for rehearing and in the alternative a rehearing *en banc*, and denying Cross-Petitioner Union Pacific's petition for panel rehearing, is contained in Appendix C to Kirby's petition.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on July 11, 2002. The Court of Appeals entered an Order denying Kirby's timely petition for rehearing *en banc* on August 15, 2002. Kirby's petition for writ of certiorari was docketed November 14, 2002, and this cross-petition for writ of certiorari is timely filed under Rule 12.5.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are set out verbatim in the Appendix:

Sections 401, 406, 494, and 502 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Rivers and Harbors Act.

Sections 511, 512, 513, 516, 518, 519 and 522 of *Subchapter II* of Chapter 11 of Title 33, U.S.C., from the Truman-Hobbs Act.

Sections 114.10, 114.30, 114.40 and 116.01(e) of 33 C.F.R.

STATEMENT OF THE CASE

This case was submitted to the District Court on stipulated facts. On May 5, 1996, Kirby's vessel, the M/V MISS DIXIE and/or its tow of barges struck Union Pacific's Clinton Railroad Bridge. Union Pacific brought this action alleging damage to its bridge was caused by negligence of the crew of the M/V MISS DIXIE and/or by the unseaworthiness of that vessel. Kirby denied its crew was negligent or its vessel was unseawothy, alleged that Union Pacific itself was negligent in the construction, design, care and maintenance of the Clinton Railroad Bridge, and further alleged the defense of set-off for damage sustained by the M/V MISS DIXIE and/or its tow.

The Clinton Railroad Bridge was authorized by, and constructed and maintained in accordance with, permits issued by the United States Coast Guard (and formerly by the United States Secretary of the Army) pursuant to the

Rivers and Harbors Act, 33 U.S.C. § 401. On the date of the allision (admiralty law term for a collision) the bridge was operated under these permits.

A separate federal act, the Truman-Hobbs Act, authorizes the United States Coast Guard to order bridge owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. §§ 511-524. On February 28, 1996, the United States Coast Guard had issued a Truman-Hobbs Order to Alter, finding that the Clinton Railroad Drawbridge "is an unreasonable obstruction to navigation . . . ". (App. 12)

The *Oregon* rule is a long-standing principle of judge-made admiralty law that raises a presumption that a vessel's crew is negligent when a vessel strikes a stationary object such as a bridge. *The Oregon*, 158 U.S. 186, 197 (1895). The District Court held the issuance of a Truman-Hobbs Act Order to Alter " . . . eliminates any presumption of crew negligence that may otherwise have existed." In reaching this result, the District Court also held:

> The Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C). They are trustworthy, they are based on factual investigation, and they are directly relevant to the issues here.

The Eighth Circuit Panel reversed the District Court's holding that the *Oregon* presumption of ship's crew negligence did not apply to an allision with a bridge for which the Coast Guard had issued a Truman-Hobbs Order to Alter. *Union Pacific Railroad Company v. Kirby Inland Marine, Inc., of Mississippi*, 296 F.3d 671, 674-675 (8th Cir. 2002). However, the Panel went on to also hold that the Coast Guard Order to Alter, stating that the Clinton

Railroad Bridge was "an unreasonable obstruction to navigation . . . ", was admissible evidence in a negligence action for damages. *Id.*, at 679-680. This cross-petition for writ of certiorari challenges this evidentiary ruling by the Panel.

REASONS FOR GRANTING THE CROSS-PETITION

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The holding in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988), was "that portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion." In *Beech*, the Court expressed no opinion on whether the Judge Advocate General Report was inadmissible on trustworthiness grounds because no party raised that issue. *Id.*, at 168, n. 11. The question in the present case is whether under Rule 803(8)(C) the Coast Guard's Truman-Hobbs Order to Alter (App. 12) is trustworthy for the purpose offered.

Since 1907 when the Clinton Railroad Bridge was built, the average barge tow has increased from 4-5 barges, powered by an 1800 horse power towboat, to 15 barges powered by a 3,200 to 4,800 horse power towboat. (See Coast Guard's Detailed Report, Clinton Railroad Bridge, which is part of a stipulated exhibit submitted to the District Court.) From 1981 to 1991 the Clinton

Railroad Bridge was struck 328 times by these modern-day larger barge tows. There are a number of other Truman-Hobbs bridges on the Mississippi River. The admissibility in a civil action for damages of a Coast Guard Truman-Hobbs Order to Alter is consequently an important question because admitting the Order to Alter has the practical effect of allowing vessels to use the Truman-Hobbs Act to financially penalize railroads and government highway authorities in civil actions for damages.

The United States Supreme Court in 1895 in *The Oregon*, 158 U.S. 186, 197 (1895) stated this rule:

> This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter.

This remains the modern-day rule and the Eighth Circuit Court of Appeals Panel held it is applicable in the present case. *Union Pacific Railroad Company v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671, 674-675 (8th Cir. 2002).

However, under the Panel's ruling that the Coast Guard Order to Alter is admissible to show a bridge owner's negligence in design, construction or maintenance, the vessel will be allowed to argue to the jury that the United States Coast Guard has determined the bridge is "an unreasonable obstruction to navigation." This language corresponds to the jury instruction that "negligence" is the failure to exercise that degree of care that a reasonable person would exercise under the circumstances present. Therefore, the practical effect of the Panel's

evidentiary ruling is to implement an erroneous construction of the Truman-Hobbs Act: that Congress intended a Truman-Hobbs Order to Alter could be used to financially penalize the railroad or government highway authority that owns the bridge.

Congress specifically said in the statutory text of the Truman-Hobbs Act that in deciding on orders to alter the Coast Guard must give due regard also for the necessities of rail or highway traffic. The Act specifically states that a railroad or government highway authority shall be required to pay only that portion of the cost of construction that provides a direct and special benefit to the railroad or government highway authority. 33 U.S.C. § 516; 33 C.F.R. 116.01(e). It is error to conclude that when Congress specifically set up this statutory scheme to avoid visiting any financial penalty upon railroad or highway interests that Congress intended that a Truman-Hobbs Order to Alter would be admissible in a damage action to prove negligence by a railroad or government highway authority in construction, design, or maintenance of a bridge.

II. THE EIGHTH CIRCUIT PANEL ERRED IN RULING THAT A UNITED STATES COAST GUARD ORDER TO ALTER A BRIDGE, THAT IS ISSUED UNDER THE TRUMAN-HOBBS ACT, 33 U.S.C. §§ 511-524, IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 803(8)(C) IN A NEGLIGENCE ACTION FOR DAMAGES ARISING FROM A VESSEL/BRIDGE ALLISION FOR THE PURPOSE OF PROVING A RAILROAD OR GOVERNMENTAL HIGHWAY AUTHORITY WAS NEGLIGENT IN THE CONSTRUCTION, DESIGN OR MAINTENANCE OF THE BRIDGE.

A. A Proposed Construction Of A Statute Which Is In Derogation Of Judge-Made Law Will Be Strictly Scrutinized, And Whenever Possible A Construction Of The Statute That Changes Longstanding Judge-Made Law Will Be Rejected.

"Where, indeed, the expressions in an act of Assembly are in general terms, they are to receive a construction that may be agreeable to the rules of common law in cases of a similar nature." *Leving v. Will*, 1 U.S. 430, 434 (1789). A statute " . . . in derogation of the common law . . . is to be taken strictly." *Brown v. Barry*, 3 U.S. 365, 367 (1797). The rule was also endorsed in *Shaw v. Railroad Company*, 101 U.S. 557, 565 (1879):

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

This rule is alive and healthy today. In *United States v. Texas*, 507 U.S. 529, 534 (1993), the Court instructed:

> Just as longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." [Citation omitted] In such cases, Congress does not write upon a clean slate. Astoria, supra, at 108, 111 S.Ct., at 2169-2170. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law. [Citation omitted]

Accord: Robert C. Herd & Company v. Krawill Machinery Corporation, 359 U.S. 297, 363-65 (1959); *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Company of Virginia*, 464 U.S. 30, 35-36 (1983).

B. The Truman-Hobbs Act Does Not Evidence Any Congressional Intent To Financially Penalize Through Negligence Damage Actions A Railroad Or Government Highway Authority For Failure To Reconstruct With Its Own Funds A Bridge That Is The Subject Of A Truman-Hobbs Order To Alter.

Federal Rule of Evidence 803(8)(C) allows an exception to the hearsay rule:

> [I]n civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law [are admissible], unless the resources of information or other circumstances indicate lack of trustworthiness.

The rule assumes that investigatory reports will be admissible. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167, 109 S. Ct. 439, 448 (1988). The *Beech* court said:

> [The rule] "provides 'ample provision for escape' if sufficient negative factors are present". That 'provision for escape' is contained in the final clause of the Rule: evaluative reports are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness."
> . . .

488 U.S. at 167, 109 S. Ct. at 448.

The Advisory Committee Notes to Federal Rule of Evidence 803 list a nonexclusive list of factors indicating whether a government report is trustworthy:

(1) Timeliness of the investigation . . . ;

(2) The special skill or experience of the official;

(3) Whether a hearing was held and the level at which conducted; and

(4) Possible motivation problems.

Union Pacific's Clinton Railroad Bridge operates under permits issued by the United States Coast Guard (and formerly by the United States Secretary of the Army) under 33 U.S.C. § 401 (Rivers and Harbors Act). That section provides that it is unlawful to construct a bridge over a navigable river without Congress' statutory consent and approval of the plans by the Secretary of Transportation. Section 406 of Title 33 provides that every person or corporation violating Section 401, 403 or 404 of Title 33 can be punished by fine and/or imprisonment, and that removal of the offending structure can be enforced by federal court injunction.

33 C.F.R. § 114.10 provides:

> The decision as to whether a bridge permit or a draw bridge operation regulation will be issued or promulgated [under 33 U.S.C. § 401] must rest primarily upon the effect of the proposed action on navigation to assure that the action provides for the reasonable needs of navigation. . . .

33 C.F.R. § 114.30 provides:

> Permits may be revoked by the issuing official for failure on the part of the permittee to comply with any of the conditions therein, or where the structures or other work constitute an unreasonable obstruction to navigation. . . .

33 C.F.R. § 114.40 (Add. 10) provides:

> The Coast Guard has the authority and responsibility for enforcement of the applicable provisions of law for the protection and preservation of navigable waters. It is the policy of the Coast Guard to secure compliance with these provisions of law short of legal proceedings. As a general principle, no action is taken when the violation is minor, unintentional, or accidental and the party responsible corrects the violation. It is the policy of the Coast Guard to implement civil or criminal proceedings in all other circumstances. . . .

The clear intent of 33 U.S.C. §§ 401 and 406, and the implementing agency regulations, is to grant to the owner of a bridge who complies with the statutes and regulations the right to operate the bridge as presently constructed. The Coast Guard has the power to levy fines, institute civil and criminal proceedings, and obtain a court injunction to remove all or part of a bridge structure, if a bridge owner does not comply with these statutes and regulations. The

Union Pacific's Clinton Railroad Bridge has not been the subject, either before or after the issuance of the Truman-Hobbs Order to Alter, of any fines, civil or criminal proceedings, or Coast Guard or court orders to remove any part of the bridge structure (other than the Truman-Hobbs Order itself). There were no plans approved for any reconstruction nor any completion date set.

The Truman-Hobbs Act has a purpose entirely different from determining whether the *design and construction* of a bridge at any particular point in time is lawful. The purpose of the Truman-Hobbs Act is to make available a process whereby the *alteration* of a bridge to make it more beneficial to the navigation industry *can be accomplished by use of federal funds* which subsidize the barge industry. 33 U.S.C. § 516; House Report No. 1447, August 2, 1939, 76th Cong., 1st Sess. (accompanying 54 Stat. Chap. 409, §§ 1-3, June 21, 1940).

In the case of a Truman-Hobbs bridge (one owned by a railroad or public highway authority), the Order to Alter does not set out any time-frame within which the alteration must be accomplished. This is because completing an alteration depends upon various actions to be taken by the government, not the least of which is a special appropriation by Congress for the alteration to the specific bridge that is the subject of the Order to Alter. 33 U.S.C. § 518. Rivers and Harbors Act *orders to alter for non-Truman-Hobbs bridges do set a time for completion.* 33 U.S.C. § 494. Section 116.01(e) of 33 C.F.R. provides:

> (e) If the Coast Guard determines that alterations to a bridge are necessary, the Commandant, U.S. Coast Guard, will issue to the bridge owner an Order to Alter containing details of the alterations necessary to render navigation through or

under the bridge reasonably free, easy, and unobstructed.

(1) *In the case of a railroad or publicly owned highway bridge, an Order to Alter is issued to the bridge owner under the provisions of the Truman-Hobbs Act (33 U.S.C. 511 et seq.). In ordering these alterations, the Coast Guard will give due regard to the necessities of free and unobstructed navigation and of rail and highway traffic.* For alterations to bridges governed by the Truman-Hobbs Act, *the Coast Guard must approve* general plans, specifications, and contracts for the alteration project, as well as approving *the apportionment of the total cost of the alterations between the United States and the bridge owner.*

(2) *For all other bridges, the Order to Alter will contain the required alterations for the bridge and will prescribe a reasonable time in which to accomplish the required alterations. The bridge owner is responsible for the entire cost of the required alterations.* [Emphasis added]

The Truman-Hobbs Act also provides for administrative penalties including fines and removal of the bridge, at the bridge owner's expense, as remedies for a bridge owner's noncompliance with orders issued under the Act. 33 U.S.C. § 519. No fine or other penalty has been levied, or other adverse action initiated, against the Union Pacific for failure to comply with any Truman-Hobbs order.

Section 494 of Title 33 (Chapter 11, *Subchapter I*) governs non-Truman-Hobbs bridge alterations. That section's first sentence grants authority to the Secretary to order alteration or removal of a bridge within a prescribed time if the bridge "shall at any time unreasonably obstruct

the free navigation of the waters over which it is constructed. . . . " Section 495 of Title 33 authorizes the Secretary to levy criminal fines and remove the bridge, enforceable by court injunction, if a bridge owner fails to comply with §§ 491-498 of Title 33.

Section 502 of Title 33 (Chapter 11, *Subchapter I*) grants the Secretary the authority to order alteration of a bridge if the Secretary "shall have good reason to believe that any railroad or other bridge now constructed, or which hereafter may be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters. . . . " Section 502 requires the Secretary to prescribe a time in which the alteration must be completed, and if it is not so completed criminal and/or civil proceedings are to be commenced to levy criminal fines and/or civil penalties.

The Truman-Hobbs Act, at 33 U.S.C. § 522(a) (Chapter 11, *Subchapter II*), provides that the first sentence of § 494 and all of § 502 are "inapplicable with respect to any bridge to which the provisions of this subchapter are applicable. . . . " *Thus, § 494 orders to alter or remove bridges and prescribing the time period allowed to comply are not applicable to Truman-Hobbs bridges carrying railroad traffic, nor are the penalties and fines set out in §§ 494 and 502.* The only penalties or fines an owner of a Truman-Hobbs railroad bridge is subject to are those set out in 33 U.S.C. § 519 for violation of an order issued under *Subchapter II* of Chapter 11. Congress has expressed its intent that time requirements and fines and penalties contained in other federal statutes on bridges found outside *Subchapter II* of Chapter 11 are not to apply to the Clinton Railroad Bridge. When Congress has expressly done this, it is illogical to contend that Congress

secretly intended the enactment of *Subchapter II* to work a penalty on a railroad bridge owner by changing existing judge-made law so as to increase the railroad bridge owner's exposure to financial loss in vessel/bridge allisions. The Eighth Circuit Panel erroneously so held below. *Union Pacific Railroad Company v. Kirby Inland Marine, Inc., of Mississippi*, 296 F.3d 671, 674-675.

The United States Supreme Court recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that damage awards are a form of regulation just like statutes and agency rules. The Court explained in *Garmon* at 359 U.S. 246-247:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. . . . Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Accord, *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-327 (1981) (Iowa state common law damage awards constituted state regulation in conflict with preemptive federal regulatory scheme).

Barge owners choose to run larger barges for financial reasons. This increases the care that must be exercised in transiting the Clinton Railroad Bridge. Union Pacific

gains no benefit from the use of larger barges, yet it is this modern-day development that resulted in the Truman-Hobbs Order to Alter. Nothing in the Truman-Hobbs Act evidences Congressional intent to penalize railroads for this development in the size of barges using the Mississippi.

The Eighth Circuit Panel's opinion states:

> We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . . " House Report No. 1447, August 2, 1939, 76th Cong., 1st Sess.

296 F.3d at 674.

The Eighth Circuit Panel's opinion further states:

> Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the Pennsylvania rule because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

Union Pacific, 296 F.3d at 675. The Coast Guard in issuing a Truman-Hobbs Order to Alter is implementing

a legislative policy of facilitating appropriation of federal funds for reconstruction of bridges with no attendant financial penalty to railroads or governmental highway authorities.

The panel decided that only the February 28, 1996, Order to Alter itself was addressed in the District Court's opinion. 296 F.3d at 679, n. 4. The District Court did not speak to the admissibility of the Detailed Truman-Hobbs Report, which contains other findings, documents and statements. However, it is the Order to Alter that contains the statement that the Clinton Railroad Bridge is "an unreasonable obstruction to navigation." It is this language which would allow the vessel to argue to the jury that the railroad (or highway authority) was guilty of common law negligence in the design, construction or maintenance of the bridge, even though the bridge must be a "lawful" bridge to qualify as the subject of a Truman-Hobbs Order to Alter. 33 U.S.C. § 511, 296 F.3d at 676.

The Coast Guard's legislative mandate was *not* to decide whether the Clinton Railroad Bridge's 33 U.S.C. § 401 bridge permit should be revoked, thus rendering it vulnerable to a charge that the bridge owner was guilty of negligence in the design, construction or maintenance of the bridge. In carrying out its legislative policy directive, the Coast Guard issues a Truman-Hobbs Order to Alter only if it determines the value of benefits derived by the barge industry from reconstruction will exceed the amount of federal funds expended for the reconstruction. 33 C.F.R. § 116.30(c). In the present case the Coast Guard determined this requirement was met.

The holding in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988), was "that portions of investigatory

reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion." In *Beech*, the court expressed no opinion on whether the Judge Advocate General Report was inadmissible on trustworthiness grounds because no party raised that issue. *Id.*, at 168, n. 11. The question in the present case is whether the Order to Alter is trustworthy for the purpose offered. Where the findings expressed in an agency report are a function of policy judgment delegated by Congress to the agency, the findings may not be trustworthy for a purpose different than the legislatively mandated policy. *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 505 F.Supp. 1125, 1148-49 (D.C. Penn. 1980), *affirmed in part, reversed in part on other grounds*, 723 F.2d 238 (3rd Cir. 1983), *cert. granted in part*, 471 U.S. 1002 (1985), *reversed on other grounds*, 475 U.S. 574 (1986). The court in *Zenith Radio* at 505 F.Supp. 1148-49 explained:

> The fifth additional criterion we have set forth – the extent to which the findings are a function of an executive, administrative, or legislative policy judgment or represent an implementation of policy – is essentially a variation on the theme of "motivational problems" identified as one of the Advisory Committee's trustworthiness criteria, although we think it different enough to warrant separate discussion. In our view, where there exists within an agency a preconceived notion of the policy that the agency is attempting to implement, e.g., sheltering United States industry from what are perceived as the deleterious effects of unfettered international competition, see Part IV infra, the "findings" of that agency are to at least some degree a function of that preconceived notion, and though they may be

> "trustworthy" in light of the particular policy objectives the agency is attempting to further, they may or may not be trustworthy for other purposes. Overriding policy concerns bring into question the objectivity of an agency's findings just as the objectivity of a report prepared in anticipation of litigation, Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed.2d 645 (1943), may be questionable.

This is the precise situation confronting this Court in the present case. The investigation underlying the Coast Guard's order to alter consists of hearsay in the form of (1) statements by members of the barge industry who want reconstruction for financial reasons, (2) statements by members of the railroad industry (or governmental highway authority) who have no reason to oppose an order that does not financially penalize them, and (3) marine casualty reports.[1] The Coast Guard Order to Alter is "trustworthy" for the legislative purpose that the Coast Guard is charged with implementing. However, it is not "trustworthy" for the purpose of persuading a jury to find a bridge owner guilty of negligence in the design, construction or

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[1] Section 6308 of Title 46, United States Code, provides:

> Notwithstanding any other provision of law, no part of a report of a Marine Casualty investigation conducted under § 6301 of this title, including findings of fact, opinions, recommendations, deliberations, or conclusions, shall be admissible as evidence or subject to discovery in any civil or administrative proceedings, other than an administrative proceeding initiated by the United States.

Thus, in the present case the Coast Guard Report is hearsay that incorporates hearsay Marine Casualty Reports that Congress has specifically legislated are inadmissible in this civil action for damages.

maintenance of a Truman-Hobbs bridge. Admitting Truman-Hobbs Orders to Alter into evidence in civil actions for damages will force railroads and government highway authorities to fight Truman-Hobbs funding proceedings. This was not the intent of Congress. Admitting a Truman-Hobbs Order to Alter in a civil action for damages is directly contrary to Congress' intent and therefore an abuse of the Court's discretion.

CONCLUSION

Appellant Union Pacific requests that the Court reverse the Eighth Circuit Panel and hold that a Truman-Hobbs Order to Alter that includes a finding the bridge is "an unreasonable obstruction to navigation" is inadmissible in an action for common law damages when offered for the purpose of proving a bridge owner was negligent in the design, construction, or maintenance of a bridge. Alternatively, Union Pacific requests that the Court reverse the Eighth Circuit Panel and hold (1) that a district court may take additional evidence on the policy the Coast Guard seeks to implement and how it proceeds to do so in a Truman-Hobbs Act funding process;[2] and (2) that on the basis of such evidence the district court may make a

[2] See subjects of testimony of Nicholas Mpras, Chief of the Office of Bridge Administration for the Coast Guard, *I & M Link, LLC. v. Northstar Navigation, Inc.*, 2001 WL 460028, p.7 (N.D. Ill. 2001), *on remand from* 198 F.3d 1010 (7th Cir. 2000), *pet. reh. denied*, 205 F.3d 333 (7th Cir. 2000).

determination of whether under Rule 803(8)(C) the Order to Alter is "trustworthy" for the purpose offered.

Respectfully submitted,

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APPENDIX

33 U.S.C. § 401. Construction of bridges, causeways, dams or dikes generally; exemptions

> It shall not be lawful to construct or commence the construction of any bridge . . . over any . . . navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of Transportation . . . When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army . . .

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33 U.S.C. § 406. Penalty for wrongful construction of bridges, piers, etc.; removal of structures.

> Every person and every corporation that shall violate any of the provisions of section 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments,

in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

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33 U.S.C. § 494. Obstruction of navigation; alterations and removals; lights and signals; draws

No bridge erected or maintained under the provisions of sections 491 to 498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of said sections, shall, in the opinion of the Secretary of Transportation, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of Transportation, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling

such bridge shall be deemed guilty of a violation of said sections; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft.

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33 U.S.C. § 502 (Ch. 11, Subch. I). Alterations, removal, or repair of bridge or accessory obstructions to navigation

(a) Criminal penalties for violation; alteration or removal requirements; notice and hearing; specification of changes, time for compliance; notice to United States attorney; misdemeanor; fine; new offenses

Whenever the Secretary of Transportation shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter

the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of Transportation shall forwith notify the United States attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter in this section mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of Transportation, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of Transportation in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $5,000, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.

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33 U.S.C. § 512 (Ch. 11, Subch. II). Obstruction of navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

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33 U.S.C. § 513. Notice, hearings, and findings

> Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary, after notice of interested parties, to hold a hearing at which the bridge owner, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and any other party or parties in interest shall have full opportunity to offer evidence and be heard as to whether any alteration of such bridge is needed, and if so what alterations are needed, *having due regard* to the necessity of free and unobstructed water navigation and *to the necessities of the rail or highway traffic*.
>
> If, upon such hearing, the Secretary determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, *having due regard also for the necessities of rail or highway traffic* thereover, he shall so find and shall issue and cause to be served upon interested parties an order requiring such alterations of such bridge as he finds to be reasonably necessary for the purposes of navigation. [Emphasis added]

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33 U.S.C. § 516. Apportionment of cost

> At the time the Secretary shall authorize the bridge owner to proceed with the project, as provided in section 515 of this title, and after an opportunity to the bridge owner to be heard thereon, the Secretary shall determine and issue an order specifying the proportionate shares of

the total cost of the project to be borne by the United States and by the bridge owner. Such apportionment shall be made on the following basis: The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration, including the expectable savings in repair or maintenance costs; and that part of the cost attributable to the requirements of traffic by railroad or highway, or both including any expenditure for increased carrying capacity of the bridge, and including such proportion of the actual capital cost of the old bridge or of such part of the old bridge as may be altered or changed or rebuilt, as the used service life of the whole or a part, as the case may be, bears to the total estimated service life of the whole or such part: Provided, that in the event the alteration or relocation of any bridge may be desirable for the reason that the bridge unreasonably obstructs navigation, but also for some other reason, the Secretary may require equitable contribution from any interested person, firm, association, corporation, municipality, county, or State desiring such relocation for such other reason, as a condition precedent to the making of any order for such alteration or relocation. The United States shall bear the balance of the cost, including that part attributable to the necessities of navigation . . .

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33 U.S.C. § 518. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this subchapter.

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33 U.S.C. § 519. Noncompliance with orders; penalties; removal of bridge

Any bridge owner who shall willfully fail or refuse to comply with any lawful order of a Secretary, made in accordance with the provisions of this subchapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding $5,000, and every month such bridge owner shall remain in default shall be deemed a new offense and subject such bridge owner to additional penalties therefor. In addition to the penalties above prescribed the Secretary may, upon the failure or refusal of any bridge owner to comply with any lawful order issued by the Secretary in regard thereto, cause the removal of any such bridge and accessory works at the expense of the bridge owner; and suit for such expense may be brought in the name of the United States against such bridge owner and recovery had for such expense in any court of competent jurisdiction. The removal of any bridge erected or maintained in violation of the provisions of this subchapter or the order or direction of the Secretary made in pursuance thereof, and compliance with any order of the Secretary made with respect to any bridge in accordance with the provisions of this subchapter, may be enforced by injunction, mandamus, or other summary process upon application to the

district court of any district in which such bridge may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary.

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33 U.S.C. § 522 (Ch. 11, Subch. II). Existing provisions of law

(a) Obstructing navigation; criminal penalties

The first sentence of section 494 of this title, and section 502 of this title, shall be inapplicable with respect to any bridge to which the provisions of this sub chapter are applicable, except to the extent provided in this section.

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33 C.F.R. § 114.10

The decision as to whether a bridge permit or a draw bridge operation regulation will be issued or promulgated must rest primarily upon the effect of the proposed action on navigation to assure that the action provides for the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment.

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33 C.F.R. § 114.30

Permits may be revoked by the issuing official for failure on the part of the permittee to comply with any of the conditions therein, or where the structures or other work constitute an unreasonable

obstruction to navigation or to the operations of the United States in the interest of navigation or flood control.

---

33 C.F.R. § 114.40

The Coast Guard has the authority and responsibility for enforcement of the applicable provisions of law for the protection and preservation of navigable waters. It is the policy of the Coast Guard to secure compliance with these provisions of law short of legal proceedings. As a general principle, no action is taken when the violation is minor, unintentional, or accidental and the party responsible corrects the violation. It is the policy of the Coast Guard to implement civil or criminal proceedings in all other circumstances . . .

---

33 C.F.R. 116.01(e)

(e) If the Coast Guard determines that alterations to a bridge are necessary, the Commandant, U.S. Coast Guard, will issue to the bridge owner an Order to Alter containing details of the alterations necessary to render navigation through or under the bridge reasonably free, easy, and unobstructed.

(1) *In the case of a railroad or publicly owned highway bridge, an Order to Alter is issued to the bridge owner under the provisions of the Truman-Hobbs Act (35 U.S.C. 511 et seq.). In ordering these alterations, the Coast Guard will give due regard to the necessities of free and unobstructed navigation and of rail and highway traffic.* For

alterations to bridges governed by the Truman-Hobbs Act, *the Coast Guard must approve* general plans, specifications, and contracts for the alteration project, as well as approving *the apportionment of the total cost of the alterations between the United States and the bridge owner.*

(2) *For all other bridges, the Order to Alter will contain the required alterations for the bridge and will prescribe a reasonable time in which to accomplish the required alterations. The bridge owner is responsible for the entire cost of the required alterations.* [Emphasis added]

House Report No. 1447, August 2, 1939, 76th Congr., 1st Sess., (accompanying 54 Stat. Chap. 409, §§ 1-13, June 21, 1940), states:

PURPOSE OF LITIGATION

The purpose of this legislation is to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law . . .

This bill provides for the apportionment of the cost of reconstruction. The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration and the cost attributable to requirements of traffic including any expenditures for increased carrying capacity of the bridge and such proportion of the actual capital cost of the old structure as may

be altered or rebuilt as the used service life of the same bears to the total estimated service life thereof.

The United States shall bear the balance of the cost including that part attributable to the necessities of navigation.

The other provisions of the bill are incidental or auxiliary to the purpose of providing orderly procedure for securing the removal and apportionment of the cost of bridges and enforcing the orders of the Secretary of War in reference thereto.

[LOGO]
Commandant
U.S. Coast Guard
Order to Alter Clinton Railroad Bridge

U.S. Department
of Transportation

United States
Coast Guard

2100 Second Street, SW
Washington, DC
20593-0001
Staff Symbol, G-NER/14
Phone: 202-267-0368

(Filed Feb. 28, 1996)

ORDER TO ALTER

WHEREAS by an act of Congress approved June 21, 1940, entitled "The Truman-Hobbs Act," as amended (33 U.S.C. 511-523), the Secretary of Transportation was authorized to order the alteration of certain bridges across the navigable waters of the United States which have been determined to be unreasonable obstructions to navigation;

AND WHEREAS the Secretary of Transportation has delegated the authority of that act to the Commandant, U.S. Coast Guard, by Section 1.46(c)(3) of Title 49, Code of Federal Regulations;

AND WHEREAS, in conformity with the provisions of the Truman-Hobbs Act, notice was given to interested parties and a public hearing was held on March 28, 1995, at Clinton, Iowa, for the purpose of obtaining testimony as to whether the Clinton Railroad Drawbridge is an unreasonable obstruction to the free navigation of the Upper Mississippi River;

AND WHEREAS, after giving consideration to the testimony and the facts presented at the public hearing and to the investigations subsequently made, the Commandant

has determined that the bridge, located on the Upper Mississippi River at mile 518.0, at Clinton, Iowa, is an unreasonable obstruction to navigation;

AND WHEREAS the Union Pacific Railroad is the owner of the bridge;

NOW THEREFORE, the Commandant directs the Union Pacific Railroad, to alter this bridge by reconstructing it on the same general alignment as the existing bridge subject to the following conditions:

1. The movable span shall provide a horizontal clearance of no less than 300 feet measured normal to the channel and a vertical clearance of no less than 52 feet above the two percent flowline or 60 feet above normal pool, whichever is greater, in the open position. These clearances are necessary for the reasonable needs of navigation.

2. No deviation from the approved clearances may be made either before or after completion of the structure unless the modification of said clearances has previously been submitted to and received the approval of the Commandant.

3. The proposed alteration must satisfy the requirements of all federal, state and local laws and regulations pertaining to the protection of the environment.

/s/ R.E. Kramek
28 February 1996
ROBERT E. KRAMEK
Admiral, U.S. Coast Guard
Commandant
Exhibit E